IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

1. S.B.Civil Second Appeal No.115/2007.
Karuna Shanker vs. Satya Narain.

2. S.B.Civil Second Appeal No.116/2007.
Karuna Shanker vs. Satya Narain.

DATE OF JUDGMENT ::: 25.5.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.S Srimali, for the appellant.
Mr.RR Nagori, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

These two appeals by the appellant/tenant arise out of the common judgment and decree dated 15.3.2007, hence, they are decided by this common judgment.

The plaintiff/respondent filed a suit for eviction of the defendant/appellant/tenant on the ground of personal bonafide necessity as the suit premises was required for the plaintiff's son. The plaintiff's case was that the suit premises was required for commercial as well as residential purposes. The trial court initially decreed the suit of the plaintiff vide judgment and decree dated 20.2.1997.

The appellant/ tenant preferred appeal in which the first appellate court remitted the matter to the trial court to decide the issues no.2 to 5 because of the reason that the plaintiff sought amendment in the plaint and took a plea that the defendant acquired suitable residential accommodation. It is admitted fact that the first appellate court allowed amendment in the plaint of the plaintiff but did not frame the issue on the plea taken by amendment which was a ground for eviction of the tenant under the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act of 1950').

Be it as it may be, after remit, the trial court proceeded to decide the issues no.2 to 5 and before that framed issue no.3A on the basis of the plea taken by the plaintiff by way of amendment. It will be worthwhile to submit here that the defendant submitted written statement to controvert the plea taken by the plaintiff about the defendant acquiring suitable

residential accommodation by purchase. The trial court struck off the issue no.3A because of the view taken by the trial court that the trial court can decide the issue for which a direction has been issued by the first appellate court and the trial court could not have framed issue no.3A despite the fact that the first appellate court itself allowed the amendment in the plaint and permitted the plaintiff to take the ground of eviction of tenant on the ground of availability of suitable residential accommodation for which the defendant already filed written statement. Be it as it may be, in the trial court, the plaintiff was permitted to produce copy of sale deed by which the defendant purchased the house. The trial court also permitted the parties to lead evidence on this question.

The trial court decided the issues no.2 to 5 and held that during pendency of the suit, one of the premises was vacated by the plaintiff's tenant which was of the same measurement. It will be worthwhile to mention here that the plaintiff's building has four apartments and it is said by the appellant that they all are of equal size and have same amenities. The trial court even after holding that one of the premises came in possession of the plaintiff and he let it out to the other tenant and one of the premises is in the plaintiff's occupation, still the plaintiff has need for the premises which is in occupation of the tenant

and this need is bonafide and for the purpose of commercial use only. The trial court held that the plaintiff's need for residential accommodation is not proved. The findings were sent to the first appellate court by the trial court.

The defendant instead of filing any objection against the findings of the trial court as could have been filed under Order 41 Rule 26 CPC, preferred separate appeal which was registered as CAD No.16/2006 by the first appellate court.

Both these appeals namely, CAD No.11/1997 and CAD No.16/2006 were decided by the first appellate court vide common judgment and decree dated 15.3.2007. The first appellate court upheld the findings of the trial court and dismissed both these appeals. The first appellate court held that the trial court committed error of law by striking out the issue no.3A. The first appellate court also held that the defendant acquired suitable residential accommodation but considered this evidence only for the purpose of deciding issue of comparative hardship.

Hence, the defendant/appellant/tenant has preferred these two second appeals.

Learned counsel for the appellant/tenant vehemently submitted that two courts below concurrently

held that during the pendency of the suit, the plaintiff got possession of one premises of equal size and from accommodation of the equal size, tenant was evicted by the plaintiff and the plaintiff handed over possession of that premises to another tenant. Despite this, the two courts below granted decree for eviction of the appellant which on the face of it is absolutely illegal as also perverse. Learned counsel for the appellant further submitted that the trial court rightly strike off the issue no.3A because of the reason that the trial court had only jurisdiction to decide the issues no.2 to 5 for which direction was given by the first appellate court. The trial court could not have framed the issue no.3A. It is also submitted that in view of the above reason of acquiring of any residential accommodation by the defendant was not the issue in the suit. It is submitted that the evidence which came on record about the defendant's acquiring other accommodation was without there being an issue andevidence on this fact was produced after striking off the relevant issue no.3A. In view of the above, the evidence should not have been looked into by the two courts below.

Learned counsel for the respondent/plaintiff submitted that the plaintiff was permitted to amend the plaint by the first appellate court and the plaintiff

included specific ground of eviction of the tenant which is available in the Act of 1950 on defendant's acquiring suitable residential accommodation. In this case, according to learned counsel for the respondent, the defendant initially acquired a suitable residential accommodation on allotment of quarter from the Railways which the defendant falsely denied. Then during the pendency of the suit, he himself purchased the residential house suitable for his residence and this fact is an admitted fact. It is also submitted that the plaintiff's amendment in plaint to include the subsequent event in the plaint was allowed by the appellate court and the issue raised by the plaintiff was contested by the defendant by filing written statement. Therefore, the first appellate court itself should have framed the issue and if has not framed the issue, then also, the defendant was well aware of the plea taken by the plaintiff. The trial court framed the issue which was in accordance with law because of the reason that the matter came to the trial court because of the amendment and if the first appellate court did not frame the issue, then the trial court rightly framed the issue. It is submitted that even if no issue is framed, even then the finding of fact cannot be vitiated on account of non-framing of issue.

Two courts below after considering the facts that one of the premises fell vacant during the pendency of

the suit was let out to another tenant and another accommodation came in possession of the plaintiff, thereafter passed the decree for eviction against the tenant, then two courts below have passed the decree consciously, then it is not a case of non-consideration of evidence or non-consideration of facts. The approach of two courts below was just, proper and legal in that situation, this Court may not interfere in second appeal in the findings of the two courts below where the approach was right and justice has been done.

I considered the submissions of learned counsel for the parties and perused the record.

There is force in the submission of learned counsel for the respondent that the appellant was well aware of the plea taken by the plaintiff and the ground was specifically raised in the plaint and it has been contested by the defendant by filing written statement and thereafter, both the parties led the evidence on the question that the defendant acquired suitable residential accommodation during pendency of the suit. In that fact situation, when the case is proved by the plaintiff by defendant's own sale deed as well as on the basis of the admission of the defendant himself and that fact has been accepted by the two courts below as proved, this Court cannot interfere in that finding of

fact by exercising jurisdiction under Section 100 CPC for upsetting the finding of fact recorded by two courts below which is in accordance with law and that finding of fact cannot be challenged by the appellant because of the reason that he himself admitted that he purchased the house and copy of the registered sale deed was produced by the plaintiff of the said house.

In view of the above, the trial court committed error of law by not passing appropriate decision on this issue on proving the case of eviction of the tenant. The appellate court also committed error by merely saying that this point can be considered only for the purpose of finding out comparative hardship of the parties.

At the cost of repetition, the pleadings were complete, issue was known, parties led evidence, then the courts should have passed the decree on the basis of the ground which is a ground for eviction of tenant under the Act of 1950.

The plaintiff filed suit on two counts that the plaintiff's son's need is for residential and for commercial purposes. He will reside in back portion and do business in front portion. When the plaintiff has proved that his son will do his business in the rented premises and the courts below found that for that purpose, the suit property will be suitable, therefore,

more suitable and more proper could have been part of the same accommodation wherein the plaintiff's son can reside and can do business in the front portion. The first appellate court and trial court ignored this important fact which can be additional reason for the tenant's eviction in addition to the reasons given by the two courts below.

Learned counsel for the appellant vehemently submitted that the plaintiff did not choose to challenge the findings on issues no.2 to 5 recorded by the trial court and there is no decree of the trial court of eviction of tenant on the ground of availability of alternate accommodation and the plaintiff did not choose to file any cross objection, then the first appellate court could not have considered evidence which came while deciding issue no.3A.

On the face of it, the argument of learned counsel for the appellant may be attractive but it is settled law that the appellate court can pass appropriate judgment and decree and may also decide the issue which has not been framed by the trial court provided evidence is available on the record. The appellate court under Order 41 Rule 33 CPC can pass the order or decree in favour of non-appealing respondent. In this fact situation, the judgment and decree of the first

appellate court on this count cannot be set aside rather the appellate court had rightly exercised the jurisdiction and took note of all the facts and circumstances so as to have proper approach to the case.

In view of the above, I do not find any substantial question of law involved in these appeals. Consequently, these second appeals deserve to be dismissed.

At this juncture, learned counsel for the appellant prayed that sufficient time may be given to the appellant to vacate the suit premises.

Learned counsel for the respondent has serious objection to the grant of time to the appellant.

I considered this prayer of learned counsel for the appellant and looking to the facts of the case, this Court is of the view that the appellant be granted time upto 31.5.2008 to vacate the suit premises.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of two months from today that he shall hand over the vacant possession to the landlord by or before 31.5.2008 and shall not part with

the possession or sublet the suit premises during this period and shall pay all the arrears of rent and decreetal amount, if due, and shall also pay the rent upto 31.5.2008 in advance within a period of two months from today before the trial court or directly to the landlord, the decree under challenge shall not be executed till 1.6.2008.

In case of non-compliance of the order or default in payment of amount mentioned above, the decree shall become executable forthwith.

With the aforesaid concession, these appeals are dismissed.

(PRAKASH TATIA), J.

S.Phophaliya